has been followed by the other federal courts that have ruled on this issue. In this case, a group of plaintiffs sought a preliminary injunction against a New York statute making it a crime to use a computer to disseminate obscene material to minors. After a thorough and illuminating discussion of the difficulties of applying old legal analogies to the Internet, the court held that the statute failed each of the three tests, found the plaintiffs likely to prevail ultimately in showing the statute to be an unconstitutional violation of the Commerce Clause, and granted the preliminary injunction. The Court concluded (at pages 183-184) that,

> "The protection of children from pedophilia is an entirely valid and laudable goal of State legislation. The New York Act's attempts to effectuate that goal, however, fall afoul of the Commerce Clause for three reasons. First, the practical impact of the New York Act results in the extraterritorial application of New York law to transactions involving citizens of other states and is therefore per se violative of the Commerce Clause. Second, the benefits derived from the Act are inconsequential in relation to the severe burdens it imposes on interstate commerce. Finally, the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes."

The Pataki analysis was followed *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Michigan, July 29, 1999), enjoining enforcement of a Michigan criminal statute prohibiting the use of the Internet to disseminate sexually explicit materials to minors, although Michigan's statute purported to apply only to speech that "originates" or "terminates" in Michigan.

Then, in *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (Tenth Cir. decided November 2, 1999), the ACLU and other Internet users sought a preliminary injunction against the enforcement of a New Mexico statute criminalizing dissemination by computer of material harmful to minors. The District Court had granted the injunction, 4 F.Supp.2d 1029, and the New Mexico officials appealed. Applying the three tests, and following the *Pataki* analysis, the Court held that the statute was likely to violate the Commerce Clause. The state officials had argued, in part, that the statute could be validly construed if applied only to one-on-one e-mail communications. To that the Court replied (at page 1161),

> "Even if it is limited to one-on-one e-mail communications, as defendants assert section 30-37-3.2(A) properly is limited, there is no guarantee that a message from one New Mexican to another New Mexican will not travel through other states en route. See *Pataki*, 969 F.Supp. at 171; see also *Cyberspace, Communications, Inc.*, 55 F.Supp.2d at 751 ("virtually all Internet speech is ... available everywhere"). Thus, section 30-37-3.2(A) "cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist." Pataki, 969 F.Supp. at 171. We therefore agree with the district court that section 30-37-3.2(A) *represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause.*" (Emphasis added)

In its decision, the Washington Supreme Court declared, in direct conflict to the *Johnson per se* holding, that "The inconsistent-regulations test and the extraterritoriality analysis

are appropriately regarded as facets of the Pike balancing test," then stepped to its own analysis of whether "the burden imposed on . . . commerce [by the Act] is clearly excessive in relation to the putative local benefits."

Johnson Balancing Test Issue The decision of the Washington Supreme Court is in conflict with the *Johnson* "benefits and burdens" analysis, because the advertiser must investigate the residency of every prospective e-mail address holder while perhaps only one in fifty may turn out to be a Washington resident, and that list may be valid one week, but inaccurate the very next week, if e-mail address holders move to or from Washington. Hypothetically, to comply with the investigation requirements of the Act, the business intending to send 100,000 advertisements must send 100,000 requests for residency information to registrants of the domain names of the customer's e-mail address, and then hope for 100,000 responses. As a separate and substantial burden on interstate commerce largely outside the boundaries of Washington, the Act assumes that the domain name registrants are expected to deal with such requests and respond to them, reporting the state of residency of its e-mail address holders. If the investigation is to be conducted by e-mail to the domain name registrants, then there would be 100,000 e-mail residency requests and 100,000 e-mail residency responses if all the players follow the statute. Obviously the logistics of such investigation by businesses and responses by domain name registrants (who have no incentive to respond) are daunting, and are almost certainly to be ignored by businesses and domain name registrants both within the United States and outside its borders, such that the state will derive inconsequential benefits when weighed against that burdensome process.

Johnson had held (at 1162),

"[The state's] own interpretation of the statute--that it applies only to one-on-one communications between a sender in New Mexico and a recipient in New Mexico whom the sender knows to be a minor--renders it so narrow in scope that the actual benefit conferred is extremely small. As another district court has observed with respect to the CDA, which defendants argue is broader in scope than section 30-37-3.2(A):

> [The statute] will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from [Albuquerque], and residents of Amsterdam have little incentive to comply with [the statute].

ACLU v. Reno, 929 F.Supp. 824, 882 (E.D.Pa.1996), aff'd, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Balanced against those limited local benefits "is an extreme burden on interstate commerce." Pataki, 969 F.Supp. at 179. Thus, section 30-37-3.2(A) constitutes an invalid indirect regulation of interstate commerce."

The "balancing" analysis of the Washington Supreme Court is not saved by its reliance on its state-law definition that the Defendant's activities were "deceptive."

There is no agreement among the states as to whether the type of advertising done by petitioner is deceptive, and it is apparently legal in at least thirty states. At the time of the Defendant's activities in 1998, among the approximately twenty states that had passed statutes governing commercial e-mail, there was substantial variation between the regulations.

Thus, the decision of the Washington Supreme Court should be reviewed to resolve its analysis with *Johnson*.

2. The Washington Supreme Court has decided two important questions of federal law that have not been, but should be, settled by this Court, specifically

a) The principles of interstate commerce unfettered by multiple state regulation, and of sole federal control of the infrastructures of interstate and foreign commerce, are at the core of American federalism, and commercial communication on the Internet should be governed, if at all, only by clear, nationally deliberated, and uniform federal law to avoid its hindrance; and

b) As applied to this out-of-state Petitioner, this Court should settle whether the Commerce Clause "nexus" test of *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) applies to limit state law regulation of an out-of-state business, as an extension of the *Quill* holding that the nexus test limits state taxation of an out-state-business. The Washington Supreme Court disregarded this Commerce Clause analysis without mention in its decision, although *Quill* had been cited and argued on that issue.

The Internet Email System is a National and International Commercial Infrastructure which should be Protected by the

Interstate Commerce Clause from Inconsistent State and Local Regulation

American constitutional federalism is making only its second expedition into a pre-existing pervasive infrastructure of worldwide commerce. The first was in the formation of America, and the infrastructure then was the commerce by boat and ship on the rivers and lakes, along the coastlines, and across the ocean bordering the original states.

The Federalist Papers No. XI[1] is entitled "The Utility Of The Union In Respect To Commercial Relations And A Navy". Written in 1787 to support the joinder of the Union, it argues, in part:

> "The importance of the Union, in a commercial light, is one of the points about which there it is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject. This applies as well to our intercourse with foreign countries as with each other....
>
> But in a state of disunion, ... [t]hat unequalled spirit of enterprise, which signalizes the genius of American merchants and navigators, and which is in itself an exhaustible mine of national wealth, would be stifled and lost,...
>
> "An unrestrained intercourse between the states themselves will advance the trade of each by an interchange of their respective productions, not only for

---

[1] Hamilton, Madison, and Jay,
"The Federalist or The New Constitution" 1787-1788.

the supply of reciprocal ones at home, but for expectation to foreign markets....

"It may perhaps be [argued], that whether the States are united or disunited, there would still be an intimate intercourse between them which would answer the same ends; but this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes, which in the course of these papers have been amply detailed. A unity of commercial, as well as political, interests, can only result from a unity of government."

Federalist Paper No. XI, though only about eight pages in length, argues for two institutions: a common, unified control of interstate and foreign commerce by the federal government, and a common unified Navy to protect and enhance trade. The reason for joinder of these arguments was, of course, that both interstate and foreign commerce, at the time, were dominated by the shipment of tangible goods over the oceans and rivers. It is illuminating that the essay argues that the nation's interests in a common Navy, to protect the waterways of the states and coastlines of the country, were the same, parallel and coextensive, with its interests in unified and unregulated commerce.

The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, contains an express authorization for Congress to "regulate Commerce with foreign Nations, and among the several States ...". In the analysis of the case at bar, it is important that Congress' authority over both foreign and interstate commerce are granted in the same breath. It is also notable that the "same breath" of authority to the federal government also includes the other two then-existing means of interstate and foreign commerce: 'to establish post-offices and post-roads' (id., par. 7). For all the same reasons that interstate and foreign

commerce were viewed in conjunction as to shipping, so should interstate and foreign commerce be viewed in conjunction as to the Internet. If anything, it is certainly easier to send a book by email from India now than by ship in 1788. Yet the constitutional federalism issues are the same as then, and the state's power to regulate that transaction no larger, yet certainly less distinguishable as to whether that transaction is from a foreign country or a neighbor state.

A "dormant" or "negative" aspect of the grant, to the federal government, of power over commerce among the states is that a state's power to impinge on interstate commerce may be limited in some situations. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). The "dormant implication of the Commerce Clause prohibits state ... regulation ... that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997).

Over the first 70 years of the development of commerce in America, there was incremental growth of the infrastructures of commerce (steamships, railroads, highways), attended by incremental growth of Commerce Clause law. Until the development of the telegraph, early analogies could be easily applied in casting the roles of state and federal regulation. The telegraph, however, was qualitatively different and required new thought. Like the Internet, and unlike the railroads, which were primarily developed in partnership with the preemption and eminent domain powers of the federal government, telegraph had surged into common private sector commercial usage before a unified national approach could be taken as to regulation of telegraph communications.

In *Pensacola Tel. Co. V. Western Union Tel. Co.*, 96 U.S. 1 (1877), the Court made remarkably prophetic analysis of this exciting new medium of communication:

> "Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.
>
> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

"It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring any where that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile State legislation." (at 96 U.S. 1, 10-11)

The dormant Commerce Clause was literally "dormant" through the first half of the 20th century, because the federal government used the Commerce Clause and the Supremacy

Clause to affirmatively enter interstate commerce almost wherever it could find the slightest premise through a period of broad expansion of federal involvement in historically local business issues.

When Arizona attempted to apply its police powers to govern train length out of concern for passenger safety, this Court identified again the dormant Commerce Clause protections of national infrastructures of commerce (the railroads) in *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). For the same reasons, the dormant Commerce Clause should protect the commercial infrastructure of internet email.

Even if the Defendant was directing commercial e-mail to Washington residents, but most certainly if he was not, Defendant does not have sufficient Commerce Clause nexus to the State of Washington to be subject to the Act.

Defendant's e-mail was sent from Oregon, where these activities were not unlawful (nor were they unlawful in the majority of other states in 1998). Without agents or physical facilities in Washington, and without actual knowledge or a reasonable basis for determining that an e-mail address belonged to a Washington resident, Defendant has no sufficient Commerce Clause nexus to the State of Washington to be subject to the e-mail statute.

In *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct.1904 (1992), the United States Supreme Court invalidated North Dakota's sales use tax as against Quill Corporation, an out-of-state office supply mail order retailer. Quill Corporation had no physical facilities and no sales agents in North Dakota, but approximately 24 tons of catalogs and

flyers were mailed by Quill into North Dakota every year. Quill was the sixth largest vendor of office supplies in the state, with annual sales of almost $1 million. The Court discussed the "nexus" requirements of the Commerce Clause, as opposed to Due Process considerations, writing,

> "In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State.
>
> "The State contends that the nexus requirements imposed by the Due Process and Commerce Clauses are equivalent and that if, as we concluded above, a mail-order house that lacks a physical presence in the taxing State nonetheless satisfies the due process "minimum contacts" test, then that corporation also meets the Commerce Clause "substantial nexus" test. We disagree. Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies.
>
> "Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast,

the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. See generally The Federalist Nos. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that the Clause prohibits discrimination against interstate commerce, (citations omitted), and bars state regulations that unduly burden interstate commerce, (citations omitted)." (at 312)

Certainly, contacts of Defendant Jason Heckel with the State of Washington are less than those of Quill Corporation with the State of North Dakota. In particular, email advertisement (or for that matter, any Internet advertisement) has much less geopolitical nexus to any particular state than the sending of tangible catalogs to physical geographic addresses.

The only activity subject to the regulation of the Act is internet advertising, not the actual transactions of sales nor delivery of goods or services. Relying on *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), Heckel contends that his lack of ties with the State of Washington -- no employees, representatives, or physical facilities -- indicates a lack of a sufficient Commerce Clause nexus with the State, such that he cannot be subject to the Act.

The State argued, and the Court of Appeals held, that

"because the Act does not involve taxation and the burden it imposes is slight in comparison, Quill is inapposite."

However, neither the Commerce Clause (U.S.C.A. Constit. Art. 1, §8, cl. 3) nor *Quill* make that distinction. To the contrary, the Commerce Clause, in its "dormant" implication, governs and limits state regulation, and taxation is only a sub-category of its mandate to the federal congress, "To regulate Commerce ...". If taxation of a business with inadequate nexus to a state violates the Commerce Clause, it can only be because the extra-territorial taxation, as a subset of a state's attempt to regulate interstate commerce, violates the Commerce Clause.

Therefore, even if the Act could be validly enforced against out-of-state businesses with sufficient Commerce Clause nexus with the state of Washington, as applied to this defendant Heckel, there is insufficient Commerce Clause nexus for regulation of his advertising.

3. The Washington Supreme Court has decided an important question of federal law in a way that conflicts with relevant decisions of the Court, specifically by deciding that the "extraterritorial" consequences of a state law regulating interstate commerce is only a facet of the "balance of burdens and benefits" test, which conflicts with the decision (plurality) in *Edgar V. Mite Corporation* 457 US 624,102 SCt 2629 (1982), that, "The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."

As routine commerce increasing defied geographical boundaries, state governments were increasingly tempted

toward protection of local interests. Many of these state statutes involved economic protectionism, but in *Edgar V. Mite Corporation* 457 US 624,102 SCt 2629 (1982), the Dormant Commerce Clause was applied to prevent "extraterritorial" application of a state's law outside its jurisdiction. There, the Court struck down a regulatory statute requiring advance disclosure of tender offers for purchase of stock interests in corporations having business interests in Illinois. The Court wrote,

> "The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. A tender offer for securities of a publicly held corporation is ordinarily communicated by the use of the mails or other means of interstate commerce to shareholders across the country and abroad. Securities are tendered and transactions closed by similar means. (At 641)
>
> "Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.
>
> "It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. In Shafer v. Farmers Grain Co., supra, at 199, 45 S.Ct., at 485, the Court held that "a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and

invalid, regardless of the purpose with which it was enacted." See also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806, 96 S.Ct. 2488, 2496, 49 L.Ed.2d 220 (1976). The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State... The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." Shaffer v. Heitner, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576, 53 L.Ed.2d 683 (1977). (at 642-643)...

"While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." (At 644)

State regulation of the commercial email advertising of an out-of-state advertiser, based on a statistical probability that some of a large group of commercial e-mails will be delivered to Washington residents, and without any other showing that the Defendant actually knew or could have reasonably have known that Washington residents held any particular email addresses, is an extraterritorial exercise of state law governing commerce, in violation of the Interstate Commerce Clause.

Prior to the trial court's judgment against Defendant, when the Washington Supreme Court reviewed this Petitioner's facial

challenge to the validity of RCW 19.190.020 (*State v. Heckel*, 143 Wn.2d 824, 24 P3d 404 (2001) as against the US Constitution Commerce Clause Art I, sec. 8, it specifically avoided the line of federal case law invalidating, as "extraterritorial", state regulation of the internet by holding:

> "Nor does the Act violate the extraterritoriality principle in the dormant Commerce Clause analysis. Here, there is no 'sweeping extraterritorial effect' that would outweigh the local benefits of the Act. *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). ... the Act addresses the conduct of spammers *in targeting Washington consumers*." Heckel I at 840. (emphasis added)

On that reasoning, the Washington Supreme Court upheld the facial challenge to the extraterritorial reach of the statute and remanded the case to the trial court.

Nevertheless, in entering judgment against Defendant in the absence of any proof that he knew that Washington residents owned the email addresses to which offending email was directed, the trial court relied on an assumption that if very large numbers of e-mails are sent randomly, the sender must know that some of those e-mail addresses must belong to Washington residents. From that, the trial court found that the Defendant had "reason to know" his e-mails were being sent to Washington residents, thereby satisfying RCW 19.190.020(1) as a matter of law. In reviewing that ruling, the Washington Court of Appeals agreed, declaring, "Heckel does not dispute that he sent between 100,000 and 1,000,000 messages per week over a period of at least four months. Based on these numbers, we agree with the State and conclude that Heckel had

reason to know that his spam would be directed to Washington residents."

In *Heckel I*, the Washington Supreme Court held that extraterritorial consequences of state regulation of interstate commerce may be considered in a "balancing test", rather than constituting per se violation of the Commerce Clause. Such analysis was drawn from Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 789 (2001), which was published after briefing and argument in *Heckel I*, such that Petitioner did not have the opportunity to rebut the article. The article directly criticized the trial court's first ruling in this case that the statute in issue here was an invalid violation of the Interstate Commerce Clause.

The Goldsmith-Sykes analysis, adopted by the Washington Supreme Court in *Heckel I*, argues that an economic model of the interstate commerce system will react and adjust to state regulation of the internet, such that a state's interests in maintaining internet commerce, and avoiding the retaliation of other states' laws, will cause that state to "balance" the extraterritorial consequences of its regulations with its own interests in the regulation.

The Goldsmith-Sykes analysis is profoundly flawed by two false economic assumptions. First, the analysis tacitly assumed that the market is self-contained, such that each government's actions may be uniformly applied to both in-state and out-of state business, and balanced against the actions of the governments of the out-of-state business jurisdictions. That is a false assumption in internet commerce, because many international competitors, outside the jurisdictional reach of a state government of the United States, and with governments

which do not care to react to the laws of a state in the United States, will continue practices despite regulation, without any balancing at all. In this setting, the Interstate Commerce Clause must be read in conjunction and parallel to the Foreign Commerce Clause, which is "per se" beyond state regulatio

Second, The Goldsmith-Sykes analysis is flawed because it falsely assumes that the economic engine of the United States is perfectly elastic, reacting and "balancing" without the friction of the uncertainty, delay, paperwork, litigation, and retaliation that separate state regulation causes, even if, in a perfect world, all things would come into balance in the end, precisely the kind of "multiplicity of causes" identified in Federalist Paper No. XI, *supra*. The Goldman-Sykes analysis should be rejected as to its application to internet commerce, in favor of the standing "per se" rule of the federal courts.

CONCLUSION

This is a case of first impression on several important issues which will determine the way that American federalism governs commerce on the Internet. The Internet is a rapidly evolving, innovative infrastructure of national and international commerce, requiring fluidity and uniformity that should be addressed by an analysis of this Court. This Court should lay the groundwork for analysis of state regulation of commercial e-mail that can be applied in the absence of federal regulation. The alternative is the chilling uncertainty, delay and inconsistency of leaving the definition of universal Internet terms and processes to local juries, local courts, and local governments. Much the same as

this Court's recent need to revisit the legal geography of "community standards" in First Amendment law as it relates to the Internet, the legal geography of the dormant Commerce Clause needs illumination in cyberspace.

Respectfully submitted,

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APPENDIX A

"RCW 19.190.010. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Commercial electronic mail message" means an electronic mail message sent for the purpose of promoting real property, goods, or services for sale or lease.

(2) "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.

(3) "Initiate the transmission" refers to the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message.

(4) "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(5) "Internet domain name" refers to a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet naming authorities,

comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.

RCW 19.190.020 (1) No person, corporation, partnership, or association may initiate the transmission of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that:

(a) Uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

(b) Contains false or misleading information in the subject line.

(2) For purposes of this section, a person, corporation, partnership, or association knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.

RCW 19.190.030. (1) It is a violation of the consumer protection act, chapter 19.86 RCW, to initiate the transmission of a commercial electronic mail message that:

(a) Uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

(b) Contains false or misleading information in the subject line.

(2) The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW."

APPENDIX B

TRIAL COURT ORDER GRANTING SUMMARY JUDGMENT

Superior Court of Washington
County of King

State of Washington,	)	
Plaintiff,	)	
	)	No. 98-2-25480-7 SEA
vs.	)	
	)	ORDER ON CIVIL
Jason Heckel, dba,	)	MOTION
Natural Instincts	)	Granting Defendants
Defendant.	)	Summary Judgment
	)	

The above-entitled court, having heard a motion for Summary Judgment & Cross-motion for summary [sic], the Court having received the records & files herein including Defendant's Motion for Summary Judgment; Plaintiff's Response and Cross-motion for Summary Judgment, Defendant's Reply, all declarations filed collaterally with the aforementioned pleadings, having heard oral argument of counsel and finding there exists no material issue of fact respecting defendant's motion, and finding that material facts exist respecting Plaintiffs Cross-motion, and finding that the statute in question here violates the Federal Interstate Commerce Clause of United States Constitution (Article 1, sec 8, cl. 3), that the Washington statute

is unduly restrictive and burdensome; Now Therefore, it is hereby ordered that Defendant's Motion for Summary Judgment is granted and all claims of Plaintiff's Complaint are dismissed with prejudice. Defendant may present a cost bill for recovery of his costs and statutory attorneys fees.

Dated March 10, 2000.

s/ Palmer Robinson
Judge

Presented by:
s/ Robert C. Van Siclen
s/ Dale L. Crandall

APPENDIX C
("Heckel I")

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

FILE
IN CLERK'S OFFICE
SUPREME COURT, STATE OF WASHINGTON
DATE: JUN 07, 2001
s/ Alexander, C.J.

STATE OF WASHINGTON,	)
	)
Appellant,	) No. 69416-8
	)
v.	) En Banc
	)
JASON HECKEL, doing business as NATURAL INSTINCTS,	)
	)
	)
Respondent.	) Filed June 7, 2001
	)

OWENS, J. -- The State of Washington filed suit against Oregon resident Jason Heckel, alleging that his transmissions of electronic mail(e-mail) to Washington residents violated Washington's commercial electronic mail act, chapter 19.190 RCW (the Act). On cross-motions for summary judgment, the trial court dismissed the State's suit against Heckel, concluding

that the Act violated the dormant Commerce Clause of the united States Constitution. This court granted the State's request for direct review. We hold that the Act does not unduly burden interstate commerce. We reverse the trial court's dismissal of the State's suit, vacate the order on attorney fees, and remand this matter for trial.

FACTS

As early as February 1996, defendant Jason Heckel, an Oregon resident doing business as Natural Instincts, began sending unsolicited commercial e-mail (UCE), or 'spam,' over the Internet.1 In 1997, Heckel developed a 46-page on-line booklet entitled 'How to Profit from the Internet.' The booklet described how to set up an on-line promotional business, acquire free e-mail accounts, and obtain software for sending bulk e-mail. From june 1998, Heckel marketed the booklet by sending between 100,000 and1,000,000 UCE messages per week. To acquire the large volume of e-mailaddresses,2 Heckel used the Extractor Pro software program, which harvests e-mail addresses from various on-line sources and enables a spammer to direct a bulk-mail message to those addresses by entering a simple command. The Extractor Pro program requires the spammer to enter a return e-mail address, a subject line,3 and the text of the message to be sent. The text of Heckel's UCE was a lengthy sales pitch that included testimonials from satisfied purchasers and culminated in an order form that the recipient could download and print. The order form included the Salem, Oregon, mailing address for Natural Instincts. Charging $39.95 for the booklet, Heckel made 30 to 50 sales per month. In June 1998, the Consumer Protection Division of the Washington State attorney General's Office

received complaints from Washington recipients of Heckel's UCE messages. The complaints alleged that Heckel's messages contained misleading subject lines and false transmission paths.4Responding to the June complaints, David Hill, an inspector from the Consumer Protection Division, sent Heckel a letter advising him of the existence of the Act. The Act provides that anyone sending a commercial e-mail message from a computer located in Washington or to an e-mail address held by a Washington resident may not use a third-party's domain name without permission,5 misrepresent or disguise in any other way the message's point of origin or transmission path, or use a misleading subject line.6 RCW 19.190.030 makes a violation of the Act a per se violation of the Consumer Protection Act, chapter 19.86 RCW (CPA). Responding to Hill's letter, Heckel telephoned Hill on or around June25, 1998. According to Hill, he discussed with Heckel the provisions of the Act and the procedures bulk e-mailers can follow to identify e-mail addressees who are Washington residents. Nevertheless, the Attorney General's Office continued to receive consumer complaints alleging that Heckel's bulk e-mailings from Natural Instincts appeared to contain misleading subject lines, false or unusable return e-mail addresses, and false or misleading transmission paths. Between June and September 1998,the Consumer Protection Division of the Attorney General's Office documented 20 complaints from 17 recipients of Heckel's UCE messages. On October 22, 1998, the State filed suit against Heckel, stating three causes of action. First, the State alleged that Heckel had violated RCW19.190.020(1)(b) and, in turn, the CPA, by using false or misleading information in the subject line of his UCE messages. Heckel used one of two subject lines to introduce his

solicitations: 'Did I get the right e-mail address?' and 'For your review--HANDS OFF!' Clerk's Papers (CP) at 6,92, 113. In the State's view, the first subject line falsely suggested that an acquaintance of the recipient was trying to make contact, while the second subject line invited the misperception that the message contained classified information for the particular recipient's review. As its second cause of action, the State alleged that Heckel had violated RCW 19.190.020(1)(a), and thus the CPA, by misrepresenting information defining the transmission paths of his UCE messages. Heckel routed his spam through at least a dozen different domain names without receiving permission to do so from the registered owners of those names. For example, of the 20 complaints the Attorney General's Office received concerning Heckel's spam, 9 of the messages showed '13.com' as the initial ISP to transmit his spam. CP at 44, 113. The 13.com domain name, however, was registered as early as November 1995 to another individual, from whom Heckel had not sought or received permission to use the registered name. In fact, because the owner of 13.com had not yet even activated that domain name, no messages could have been sent or received through 13.com. Additionally, the State alleged that Heckel had violated the CPA by failing to provide a valid return e-mail address to which bulk-mail recipients could respond. When Heckel created his spam with the Extractor Pro software, he used at least a dozen different return e-mail addresses with the domain name 'juno.com' (Heckel used the Juno accounts in part because they were free). CP at 88-89. None of the Juno e-mail accounts was readily identifiable as belonging to Heckel; the user names that he registered generally consisted of a name or a name plus a number (e.g.,'marlin1374,' 'cindyt5667,' 'howardwesley13,'

'johnjacobson1374,' and 'sjtowns'). CP at 88-89. During August and September 1998, Heckel's Juno addresses were canceled within two days of his sending out a bulk e-mail message on the account. According to Heckel, when Juno canceled one e-mail account, he would simply open a new one and send out another bulk mailing. Because Heckel's accounts were canceled so rapidly, recipients who attempted to reply were unsuccessful. The State thus contended that Heckel's practice of cycling through e-mail addresses ensured that those addresses were useless to the recipients of his UCE messages.7 During the months that Heckel was sending out bulk e-mail solicitations on the Juno accounts, he maintained a personal e-mail account from which he sent no spam, but that e-mail address was not included in any of his spam messages. The State asserted that Heckel's use of such ephemeral e-mail addresses in his UCE amounted to a deceptive practice in violation of RCW 19.86.020.The State sought a permanent injunction and, pursuant to RCW 19.86.140 and.080 of the CPA, requested civil penalties, as well as costs and a reasonable attorney fee. In early 2000, the parties cross-moved for summary judgment. On March 10, 2000, the trial court entered an order granting Heckel's motion and denying the State's cross motion. The court found that the Act violated the Commerce Clause (U.S. Const. art. I, sec.8, cl. 3) and was 'unduly restrictive and burdensome.' CP at 175. The order permitted Heckel to 'present a cost bill for recovery of his costs and statutory attorneys fees.' CP at 175. Heckel then moved the court fora fee award of $49,897.50. Denying Heckel's request for fees under RCW19.86.080 of the CPA, the court limited Heckel's award to statutory costs under RCW 4.84.030. Challenging the trial court's finding that the Act

violated the Commerce Clause, the State sought this court's direct review. Heckel cross-appealed, seeking reversal of the trial court's denial of his attorney fee request under the CPA. We granted direct review.

ISSUE

Does the Act, which prohibits misrepresentation in the subject line or transmission path of any commercial e-mail message sent to Washington residents or from a Washington computer, unconstitutionally burden interstate commerce?

ANALYSIS

Standard of Review. The State seeks review of the trial court's decision on summary judgment that the Act violated the dormant Commerce Clause. This court reviews de novo a trial court's grant of summary judgment and views all facts in the light most favorable to the party challenging the summary dismissal. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124(2000). A legislative act is presumptively constitutional, 'and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt.' State v. Brayman, 110 Wn.2d 183, 193, 751 P.2d 294(1988); see also Frach v. Schoettler, 46 Wn.2d 281, 280 P.2d 1038, cert.denied, 350 U.S. 838 (1955). A party meets the standard 'if argument and research show that there is no reasonable doubt that the statute violates the constitution.' Amalgamated Transit Union Local 587 v. State, 142 Wn.2d183, 205, 11 P.3d 762 (2000) (citing Belas v. Kiga, 135 Wn.2d 913, 920, 959P.2d 1037 (1998)).Heckel's Challenge under the Commerce Clause. The Commerce Clause grants Congress the 'power . . . {t}o regulate commerce with foreign nations, and among the several states.' U.S. Const. art. I, sec. 8, cl. 3. Implicit in this affirmative grant is the negative or 'dormant' Commerce Clause-

-the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce. See Franks & Son, Inc. v. State, 136 Wn.2d 737, 747, 966 P.2d 1232 (1998). Analysis of a state law under the dormant Commerce Clause generally follows a two-step process. We first determine whether the state law openly discriminates against interstate commerce in favor of intrastate economic interests. If the law is facially neutral, applying impartially to in-state and out-of-state businesses, the analysis moves to the second step, a balancing of the local benefits against the interstate burdens: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities . . . .

Id. at 754 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L. Ed. 2d 174 (1970)). The Act is not facially discriminatory. The Act applies evenhandedly to in-state and out-of-state spammers: 'No person' may transmit the proscribed commercial e-mail messages 'from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident.' RCW 19.190.020(1)(emphasis added). Thus, just as the statute applied to Heckel, an Oregon resident, it is enforceable against a Washington business engaging in the same practices. Because we conclude that the Act's local benefits

surpass any alleged burden on interstate commerce, the statute likewise survives the Pike balancing test. The Act protects the interests of three groups--ISPs, actual owners of forged domain names, and e-mail users. The problems that spam causes have been discussed in prior cases and legislative hearings. A federal district court described the harms a mass e-mailer caused ISP CompuServe: In the present case, any value CompuServe realizes from its computer equipment is wholly derived from the extent to which that equipment can serve its subscriber base. . . . {H}andling the enormous volume of mass mailings that CompuServe receives places a tremendous burden on its equipment. Defendants' more recent practice of evading CompuServe's filters by disguising the origin of their messages commandeers even more computer resources because CompuServe's computers are forced to store undeliverable e-mail messages and labor in vain to return the messages to an address that does not exist. To the extent that defendants' multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff's computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct. CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D.Ohio 1997) (citations omitted) (granting preliminary injunction against bulk e-mailer on theory of trespass to chattels); see also Am. Online, Inc .v. IMS, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) ('rely{ing} on the reasoning of CompuServe' and finding that bulk e-mailer 'injured AOL's business goodwill and diminished the value of its possessory interest in its computer network'). To handle the increased e-mail traffic attributable to deceptive

spam, ISPs must invest in more computer equipment.8 Operational costs likewise increase as ISPs hire more customer service representatives to field spam complaints and more system administrators to detect accounts being used to send spam.9Along with ISPs, the owners of impermissibly used domain names and e-mail addresses suffer economic harm. For example, the registered owner of 'localhost.com' alleged that his computer system was shut down for three days by 7,000 responses to a bulk-mail message in which the spammer had forged the e-mail address 'nobody@localhost.com' into his spam's header. Seidl v. Greentree Mortgage Co., 30 F. Supp. 2d 1292, 1297-98 (D. Colo.1998); see also Spamming: The E-Mail You Want to Can: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the Comm. on Commerce, 106th Cong. 9 (1999) (statement of Rep. Gary G. Miller)(attached as App. 4, Br. of Amicus WAISP); 146 Cong. Rec. H6373 (daily ed. July 18, 2000) (statement of Rep. Miller), available at http://thomas.loc.gov/home/c106query.html (recounting similar experience of California constituent).Deceptive spam harms individual Internet users as well. When a spammer distorts the point of origin or transmission path of the message, e-mail recipients cannot promptly and effectively respond to the message (and thereby opt out of future mailings); their efforts to respond take time, cause frustration, and compound the problems that ISPs face in delivering and storing the bulk messages. And the use of false or misleading subject lines further hampers an individual's ability to use computer time most efficiently. When spammers use subject lines 'such as 'Hi There!,"Information Request,' and 'Your Business Records," it becomes 'virtually impossible' to distinguish spam from

legitimate personal or business messages.10 Individuals who do not have flat-rate plans for Internet access but pay instead by the minute or hour are harmed more directly, but all Internet users (along with their ISPs) bear the cost of deceptive spam. This cost-shifting–from deceptive spammers to businesses and e-mail users--has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone.11 In a case involving the analogous practice of junk faxing (sending unsolicited faxes that contain advertisements), the Ninth Circuit acknowledged 'the government's substantial interest in preventing the shifting of advertising costs to consumers.' Destination Ventures, Ltd. v. F.C.C., 46 F.3d 54, 56(9th Cir. 1995) (holding that the Telephone Consumer Protection Act's (47U.S.C. sec. 227) limitations on commercial speech did not violate the First Amendment). We thus recognize that the Act serves the 'legitimate local purpose' of banning the cost-shifting inherent in the sending of deceptive spam. Under the Pike balancing test, '{i}f a legitimate local purpose is found, then the question becomes one of degree.' 397 U.S. at 142. In the present case, the trial court questioned whether the Act's requirement of truthfulness (in the subject lines and header information) would redress the costs associated with bulk e-mailings. As legal commentators have observed, however, 'the truthfulness requirements (such as the requirement not to misrepresent the message's Internet origin) make spamming unattractive to the many fraudulent spammers, thereby reducing the volume of spam.' Jack L. Goldsmith & Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 819 (2001). Calling 'simply wrong' the trial court's view 'that truthful identification in the subject header would do little to relieve the

annoyance of spam,' the commentators assert that '{t}his identification alone would allow many people to delete the message without opening it (which takes time) and perhaps being offended by the content.' Id. The Act's truthfulness requirements thus appear to advance the Act's aim of protecting ISPs and consumers from the problems associated with commercial bulk e-mail. To be weighed against the Act's local benefits, the only burden the Act places on spammers is the requirement of truthfulness, a requirement that does not burden commerce at all but actually 'facilitates it by eliminating fraud and deception.' Id. Spammers must use an accurate, nonmisleading subject line, and they must not manipulate the transmission path to disguise the origin of their commercial messages. While spammers incur no costs in complying with the Act, they do incur costs for noncompliance, because they must take steps to introduce forged information into the header of their message.12 In finding the Act 'unduly burdensome,'CP at 175, the trial court apparently focused not on what spammers must do to comply with the Act but on what they must do if they choose to use deceptive subject lines or to falsify elements in the transmission path. To initiate deceptive spam without violating the Act, a spammer must weed out Washington residents by contacting the registrant of the domain name contained in the recipient's e-mail address.13 This focus on the burden of noncompliance is contrary to the approach in the Pike balancing test, where the United States Supreme Court assessed the cost of compliance with a challenged statute. Pike, 397 U.S. at 143. Indeed, the trial court could have appropriately considered the filtering requirement a burden only if Washington's statute had banned outright the sending of UCE messages to Washington residents. We therefore conclude that Heckel has failed to

prove that 'the burden imposed on ... commerce {by the Act} is clearly excessive in relation to the putative local benefits.' Id. at 142(emphasis added).Drawing on two 'unsettled and poorly understood' aspects of the dormant Commerce Clause analysis, Heckel contended that the Act (1) created inconsistency among the states and (2) regulated conduct occurring wholly outside of Washington.14 The inconsistent-regulations test and the extraterritoriality analysis are appropriately regarded as facets of the Pike balancing test.15 The Act survives both inquiries. At present, 17other states shave passed legislation regulating electronic solicitations.16 The truthfulness requirements of the Act do not conflict with any of the requirements in the other states' statutes, and it is inconceivable that any state would ever pass a law requiring spammers to use misleading subject lines or transmission paths. Some states' statutes do include additional requirements; for example, some statutes require spammers to provide contact information (for opt-out purposes) or to introduce subject lines with such labels as 'ADV' or 'ADV-ADLT.' But because such statutes 'merely create additional, but not irreconcilable, obligations,' they 'are not considered to be 'inconsistent" for purposes of the dormant Commerce Clause analysis. Instructional Sys., Inc. v. Computer Curriculum Corp., 35F.3d 813, 826 (3d Cir. 1994). The inquiry under the dormant Commerce Clause is not whether the states have enacted different anti-spam statutes but whether those differences create compliance costs that are 'clearly excessive in relation to the putative local benefits.' Pike, 397 U.S. at142. We do not believe that the differences between the Act and the anti-spam laws of other states impose extraordinary costs on businesses deploying spam.17Nor does the Act violate the extraterritoriality principle in the dormant Commerce Clause

analysis. Here, there is no 'sweeping extraterritorial effect' that would outweigh the local benefits of the Act. Edgar v. MITE Corp., 457 U.S. 624, 642, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). Heckel offers the hypothetical of a Washington resident who downloads and reads the deceptive spam while in Portland or Denver. He contends that the dormant Commerce Clause is offended because the Act would regulate the recipient's conduct while out of state. However, the Act does not burden interstate commerce by regulating when or where recipients may open the proscribed UCE messages. Rather, the Act addresses the conduct of spammers in targeting Washington consumers. Moreover, the hypothetical mistakenly presumes that the Act must be construed to apply to Washington residents when they are out of state, a construction that creates a jurisdictional question not at issue in this case. In sum, we reject the trial court's conclusion that the Act violates the dormant Commerce Clause. Although the trial court found particularly persuasive American Libraries Association v. Pataki, 969 F. Supp. 160(S.D.N.Y. 1997), that decision--the first to apply the dormant Commerce Clause to a state law on Internet use--is distinguishable in a key respect.18 At issue in American Libraries was a New York statute that made it a crime to use a computer to distribute harmful, sexually explicit content to minors. The statute applied not just to initiation of e-mail messages but to all Internet activity, including the creation of websites. Thus, under the New York statute, a website creator in California could inadvertently violate the law simply because the site could be viewed in New York. Concerned with the statute's 'chilling effect,' id. at 179, the court observed that, if an artist 'were located in California and wanted to display his work to a prospective purchaser in Oregon, he could not employ his

virtual {Internet} studio to do so without risking prosecution under the New York law.'Id. at 174. In contrast to the New York statute, which could reach all content posted on the Internet and therefore subject individuals to liability based on unintended access, the Act reaches only those deceptive UCE messages directed to a Washington resident or initiated from a computer located in Washington; in other words, the Act does not impose liability for messages that are merely routed through Washington or that are read by a Washington resident who was not the actual addressee.

CONCLUSION

The Act limits the harm that deceptive commercial e-mail causes Washington businesses and citizens. The Act prohibits e-mail solicitors from using misleading information in the subject line or transmission path of any commercial e-mail message sent to Washington residents or from a computer located in Washington. We find that the local benefits of the Act outweigh any conceivable burdens the Act places on those sending commercial e-mail messages. Consequently, we hold that the Act does not violate the dormant Commerce Clause of the United States Constitution. We reverse the trial court and remand the matter for trial. The trial court's order on attorney fees is vacated.

WE CONCUR:

1 "Commercial electronic mail message' means an electronic mail message sent for the purpose of promoting real property, goods, or services for sale or lease.' RCW 19.190.010(2). The term 'spam' refers broadly to unsolicited bulk e-mail (or "junk' e-mail'), which 'can be either commercial (such as an

advertisement) or noncommercial (such as a joke or chain letter).' Sabra-Anne Kelin, State Regulation of Unsolicited Commercial E-Mail, 16 Berkeley Tech. L.J. 435, 436 & n.10 (2001). Use of the term 'spam' as Internet jargon for this seemingly ubiquitous junk e-mail arose out of a skit by the British comedy troupe Monty Python, in which a waitress can offer a patron no single menu item that does not include spam: 'Well, there's spam, egg, sausage and spam. That's not got much spam in it.' 2 Graham Chapman et al., The Complete Monty Python's Flying Circus: All the Words 27 (Pantheon Books 1989); see also Kadow's Internet Dictionary, at http://www.msg.net/kadow/answers/s.html (last visited May 7, 2001). Hormel Foods Corporation, which debuted its SPAM luncheon meat in 1937, has dropped any defensiveness about this use of the term and now celebrates its product with a website (www.spam.com). See Hormel Objects to Cyber Promotions' Use of 'SPAM' Mark, 4 No. 1 Andrews Intell. Prop. Litig. Rep. 19 (1997); Laurie J. Flynn, Gracious Concession on Internet 'Spam,' N.Y. Times, Aug. 17, 1998, at D3. Because the term has been widely adopted by Internet users, legislators, and legal commentators, we use the term herein, along with its useful derivatives 'spammer' and 'spamming.'

2 "Electronic mail address' means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.'RCW 19.190.010(3).

3 The subject line, similar to the 'RE' line of a letter or memorandum, is generally displayed (at least in part) alongside the sender's name in the recipient's e-mail inbox.

4 Each e-mail message, which is simply a computer data file, contains so-called 'header' information in the 'To,' 'From,' and

'Received' fields. When an e-mail message is transmitted from one e-mail address to another, the message generally passes through at least four computers: from the sender's computer, the message travels to the mail server computer of the sender's Internet Service Provider (ISP); that computer delivers the message to the mail server computer of the recipient's ISP, where it remains until the recipient retrieves it onto his or her own computer. Every computer on the Internet has a unique numerical address (an Internet Protocol or IP address), which is associated with a more readily recognizable domain name (such as 'mysite.com'). As the e-mail message travels from sender to recipient, each computer transmitting the message attaches identifying data to the 'Received' field in the header. The information serves as a kind of electronic postmark for the handling of the message. See Clerk's Papers (CP) at 130-34. It is possible for a sender to alter (or 'spoof') the header information by misidentifying either the computer from which the message originated or other computers along the transmission path. See Kelin, supra note 1, at 445.

5 See RCW 19.190.010(6) (defining 'Internet domain name').

6 '(1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that: '(a) Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or '(b) Contains false or misleading information in the subject line. '(2) For purposes of this section, a person knows that

the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.'RCW 19.190.020.

7 The experience of 1 of the 17 complainants to the Attorney General's Office is illustrative. Nancy Smith received Heckel's spam on September 1,1998; the message was sent from a Juno account with the user name'apollo1113,' and the subject line read 'For your review--HANDS OFF.' CP at 140. On or about September 1, 1998, Smith sent a copy of the Natural Instincts order form with a check for $39.95 by U.S. Mail to the Salem, Oregon, address provided on the order form. Hearing nothing for some weeks, Smith sent a message by return e-mail on September 30, 1998, but within a minute she received a return e-mail from Juno stating that the attempt had failed due to termination of the account. Unable to find any information about Natural Instincts on the Internet, Smith contacted her bank and learned that the check had cleared two weeks earlier. Smith then contacted the Attorney General's Office. CP at 140-41, 149-50.

8 '{W}hen Internet users attempt to reply to deceptive spam that has a fraudulent return address or domain name, one e-mail message (and the ISP{'s} related computer log entry) instantly becomes three separate e-mail messages (and additional computer log entries) because: (1) the ISP server that is the victim of the fraudulent return address or domain name sends an error message back to the Internet user and their ISP announcing that the return path was invalid, (2) a message is sent to the server administrator requesting an investigation of the return address for potential problems, and (3) a message is sent

to the server log in case the ISP wishes to track down the problem later. With bulk spam, these messages snowball to clog ISP resources, and ISPs have little choice but to purchase additional equipment at a significant cost.' Br. of Amicus Washington Association of Internet Service Providers (WAISP) at 11-12.

9 See Br. of Amicus WAISP at 12-13; see also Spamming: The E-Mail You Want to Can: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the Comm. on Commerce, 106th Cong. 41-42 (1999)(statement of Michael Russina, Director of Systems Operations, SBC Internet Services) (attached as App. 4, Br. of Amicus WAISP).

10 Testimony of Ed McNichol at Hearing on H.B. 2752 Before the Washington House Comm. on Energy and Utilities (Jan. 28, 1998) (partial transcript attached as App. 2, Br. of Amicus WAISP; audio also available at http://198.239.32.162/ramgen/199801/1998010112.ra).

11 See Spamming: The E-Mail You Want to Can, supra note 9, at 1 (statement of Rep. W.J. Tauzin, Chairman, Subcomm. on Telecommunications, Trade, and Consumer Protection) (attached as App. 4, Br. of Amicus WAISP).

12 'This generally involves paying a bulk re-mailing service to forge e-mail headers and send out the spammer's message, or at least running additional software programs to alter the e-mail messages' address and domain name information.' Br. of Amicus WAISP at 8.

13 See RCW 19.190.020(2). The Washington Association of Internet Service Providers (WAISP) and the Washington Attorney General co-sponsor a registry of Washington residents who do not want to receive spam. See WAISP Registry Page, at http://registry.waisp.org (last visited May 7, 2001).

14 Jack L. Goldsmith & Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 789 (2001).

15 See Goldsmith & Sykes, supra note 14, at 808 (concluding that 'inconsistent-regulations cases, like extraterritoriality cases, should be viewed as just another variant of balancing analysis'); see also William Lee Biddle, State Regulation of the Internet: Where Does the Balance of Federalist Power Lie? 37 Cal. W. L. Rev. 161, 167 (2000) (suggesting that '{t}he burden placed on interstate commerce through inconsistent local regulation is more appropriately placed as part of the Pike balancing test, rather than its own, separate line of inquiry').

16 See David E. Sorkin, Spam Laws, at http://www.spamlaws.com/state/index.html; see also Max P. Ochoa, Legislative Note: Recent State Laws Regulating Unsolicited Electronic Mail,16 Santa Clara Computer & High Tech. L.J. 459 (2000); Br. of Appellant at23 and App. A, B. Proposed federal legislation, the Unsolicited Commercial electronic Mail Act of2000, H.R. 3113, 106th Cong. (2000), was passed by the House on July 18, 2000, and has been referred to the Senate Committee on Commerce, Science, and Transportation. The text of the bill may be accessed through http://thomas.loc.gov/home/c106query.html.

17 As the State notes, '{p}resently, mail and phone solicitors are expected to abide by different states' telemarketing laws and other consumer protection laws. E-mail solicitors should not be excused from the burden of complying with a state's law simply because of the ease of sending bulk e-mail solicitations in relation to other forms of commercial solicitation.' CP at 53

18 See CP at 216. At least 10 other cases have distinguished American Libraries. See, e.g., Hatch v. Super. Ct., 80 Cal. App. 4th 170, 94 Cal.Rptr. 2d 453 (2000); People v. Hsu, 82

Cal. App. 4th 976, 99 Cal. Rptr. 2d184 (2000); Ford Motor Co. v. Tex. Dep't of Transp., 106 F. Supp. 2d 905,909 (W.D. Tex. 2000).

APPENDIX D
TRIAL COURT JUDGMENT

HONORABLE DOUGLAS NORTH
October 18, 2002
1:30p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON NO. 98-2-2548p-7SEA
Plaintiff JUDGMENT AND DECREE
v. (CLERK'S ACTION REQUIRED)
JASON HECKEL, doing business as NATURAL INSTINCTS,

I. JUDGMENT SUMMARY

1.1. Judgment creditor: State of Washington
1.2. Judgment Debtor: Jason Heckel d/b/a Natural Instincts
1.3. Principal Judgment Amount $ 2,000.00
1.4. Civil Penalties; $2000.00
1.5. Costs and Attorney Fees:
a. Attorneys Fees $92,665.32
b. Costs $ 3,532.42
1.6. Total Judgment Amount: $96,197.74
1.7. Post Judgment Interest Rate 12% per annum

1.8 Attorney for Judgment Creditor: Owen F. Clarke, Jr., Senior Assistant Attorney General

1.9. Attorney for Judgment Debtor: Dale L. Crandall

The above cause having come on for hearing on Plaintiffs Motion for Partial Summary Judgment on September 13, 2002, Owen F. Clarke, Jr., Senior Assistant Attorney General, appearing for the State of Washington (hereinafter "Plaintiff"), and Dale L. Crandall appearing for Jason Heckel, d/b/a Natural Instincts (hereinafter "Defendant"), and

The Court having entered an Order Granting Plaintiff's Motion for Partial Summary Judgment, and

This matter now having been fully adjudicated and there being no just cause for delay with regard to entering a Judgment and Decree against Defendant,

It is hereby ORDERED, ADJUDGED, AND DECREED as follows:

II INJUNCTIONS

2.1. Application of Injunctions. The injunctive provisions of this Judgment and Decree shall apply to Defendant and Defendant's successors, assigns, agents, servants, employees, representatives, and all other persons or entities in active concert or participation with Defendant.

2.2. Notice. Defendant shall immediately inform all Successors, assigns, transferees, officers, agents, servants employees, representatives and all other persons or entities in active concert or participation with Defendant of the terms and conditions of this Judgment and Decree and direct those persons and/or entities to comply with them.

2.3. Injunctions. Defendant and all of Defendant's successors, assigns, transferees, agents, servants, employees,

representatives, and all other persons or entities in active concert or participation with Defendant are hereby permanently enjoined and restrained from directly or indirectly engaging in the following acts or practices:

2.3.1. Initiating the transmission of, conspiring with another to initiate the transmission of, or assisting another with the transmission of commercial electronic mail messages from a computer located in Washington or to an electronic mail address that the sender knows or has reason to know is a Washington resident (based upon information that is reasonably available to the sender, including, without limitation, registration of the recipient's electronic mail address with the Washington Association of Internet Service Providers) that:

(a) Uses a third party's internet domain name without permission of the third party; or

(b) Misrepresents or obscures any information in identifying the point of origin or the transmission path of the message; or

(c) Contains false or misleading information in the subject line of the message.

2.3.2. Violating the Commercial Electronic Mail Act, chapter 19.190 RCW, as presently enacted or hereafter amended.

2.3.3. Violating Consumer Protection Act, chapter 19.86 RCW, as presently enacted or hereafter amended.

III. CIVIL PENALTIES

3.1. Pursuant to RCW 19.86.140, Plaintiff shall recover, and Defendant shall be liable for and pay civil penalties TWO THOUSAND DOLLARS ($2000) for violation of the Commercial Electronic Mail Act, chapter 19.190 RCW, which,

pursuant to RCW 19.90.030, are per se violations of the Consumer Protection Act.

IV. ATTORNEY'S FEES AND COSTS

4.1 Plaintiff is the prevailing party in this action, having been granted summary judgment on the issue of Defendant' liability for violating the Commercial Electronic Mail Act which is a per se violation of the Consumer Protection Act. The Court may in its discretion award costs including a reasonable attorney's fee to the prevailing party pursuant to RCW 19.86.080. The Court finds Plaintiff's Petition for Attorney's Fees and Costs reasonable and orders Defendant to and orders Defendant to pay the sum of NINETY-SIX THOUSAND, ONE HUNDRED NINETY-SEVEN DOLLARS and SEVENTY-FOUR CENTS ($96,197.74) to Plaintiff for its attorney's fees and costs incurred in pursuing this matter.

4.2. Any costs or fees which may be incurred by Plaintiff in enforcing the provisions of this Judgment and Decree, including the costs of collection actions, shall be in addition to and exclusive of the attorney's fees costs ordered in paragraph 4.1.

V. ENFORCEMENT

5.1. Any violation of the injunctions contained in this Judgment and Decree may form the basis for further enforcement proceedings, including, but not limited to contempt of court proceedings and/or forfeiture of an additional civil penalty of up to $25,000, pursuant to RCW 19.86.140, for

violation of the injunctions contained herein after this Judgment and Decree is entered.

5.2. Jurisdiction is retained for the purpose of enabling any party to this Judgment and Decree with or without prior consent or approval of the other party to apply to the Court at any time for the enforcement or compliance therewith, the punishment of violations thereof, or the modification or clarification thereof.

5.3. Nothing in this Judgment and Decree shall be construed as a limit on or bar against any individual or entity pursuing separate remedies against Defendant.

5.4. Representatives of the Office of the Attorney General shall be permitted, upon reasonable notice to Defendant, to access, inspect, and copy business records and documents under the control of Defendant relating to Defendant's commercial electronic mail business in order to monitor compliance with this Judgment and Decree, provided that such inspection and copying shall be done in such a way as to minimize disruption of Defendant's business activities.

5.5 Representatives of the Office of the Attorney General shall be permitted to question the Defendant and Defendant's employees informally or by deposition in order to monitor compliance with this Judgment and Decree.

VI. ENTRY BY CLERK

6.1. There being no reason for delay, the Clerk of the Court is hereby directed to enter this Judgment and Decree.

DONE IN OPEN COURT 18th day of October, 2002.

/s/ Douglass A. North
HONORABLE DOUGLAS NORTH
Superior Court Judge

Presented by:
CHRISTINE 0. GREGOIRE

/s/ Owen F. Clark, Jr.
OWEN F. CLARKE, JR. WSBA #6779
Senior Assistant Attorney General
Attorneys for Plaintiff, State of Washington

APPENDIX E

OPINION OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Court of Appeals Division I
State of Washington

Docket Number: 51204-8-I
Title of Case: State of Washington, Respondent v. Jason Heckel dba Natural Instincts, Appellant
File Date: 06/28/2004

SOURCE OF APPEAL

Appeal from Superior Court of King County
Docket No: 98-2-25480-7
Judgment or order under review
Date filed: 09/13/2002
Judge signing: Hon. Douglass North

JUDGES

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,,)
) NO. 51204-8-I
Appellant,)
) DIVISION ONE
v.)
)
JASON HECKEL, doing)
business as)
NATURAL INSTINCTS,)
) PUBLISHED OPINION

Respondent.) FILED

KENNEDY, J. -- In 1998, the Washington State Attorney General's office filed suit against Oregon resident Jason Heckel, alleging violations of Washington's Commercial Electronic Mail Act (the Act), RCW 19.190. The ACT does not prohibit spam as such; rather, it prohibits misrepresentation in the subject line or transmission path of any unsolicited commercial e-mail message sent from a computer located in Washington, or sent to an e-mail address that the sender knows or has reason to know is held by a Washington resident. It also prohibits use of a third party's Internet domain name without permission of that party. In 2000, on cross-motions for summary judgment, the trial court dismissed the State's claims, concluding that the Act violated the Commerce Clause of the United States Constitution. In State v. Heckel, 143 Wn.2d 824, 24 P.3d 404, cert. denied, 534 U.S. 997, 122 S. Ct. 467, 151 L. Ed. 2d 383 (2001) (Heckel I)our Supreme Court held that the Act does not unduly burden interstate commerce, reversed the dismissal, and remanded the case to the trial court. In August 2002, the State moved for partial summary judgment. On September13, 2002, the trial court granted summary judgment to the State, and on October 18, 2002, entered a judgment and decree imposing permanent injunctions and a civil penalty on Heckel, and awarding attorney fees and costs to the State. Heckel appeals, contending (1) that the State failed to show that he knew or had reason to know that his spam -- which contained misrepresentations in the subject lines and used a third party's domain name without permission -- had been sent to a particular e-mail address held by a Washington resident, (2) that the Act as applied to him in this case violates the

Commerce Clause, and (3) that there is a factual issue for trial regarding whether his subject lines were "misleading" under First Amendment analysis of commercial speech. We reject these contentions and affirm the trial court's judgment and decree.

FACTS

In 1997, Jason Heckel developed a 46-page on-line booklet entitled"How to Profit from the Internet," which included information on setting up an on-line promotional business, acquiring free e-mail accounts, and obtaining software to build basic web sites and send bulk e-mail. From June to October 1998, Heckel sent between 100,000 and 1,000,000 unsolicited commercial e-mail, or "spam," messages over the Internet each week. Each message used one of two subject lines: "Did I get the right e-mail address?" and "For your review - HANDS OFF!" Clerk's Papers at 39. The text of each message was a sales pitch for his booklet, priced at $39.95,and included an order form listing the mailing address for Heckel's Salem, Oregon business, Natural Instincts.

In June 1998, after receiving complaints from Washington recipients of Heckel's messages, David Hill of the Attorney General's Office sent Heckel a letter advising him of Washington's new law regarding commercial e-mail. On or around June 25, 1998, Heckel telephoned Hill for more information. During their conversation, Hill explained the provisions of the Act and procedures that bulk e-mailers can use to identify Washington e-mail address holders. Hill specifically referred Heckel to the Washington Association of Internet Providers on-line registry, where Washington residents who do not wish to receive spam can register their e-mail addresses, and thus where responsible e-commerce businesses can find listsof Washington e-mail addresses. After this

conversation, Heckel did nothing to change his spamming procedure, and consumers continued to file complaints with the Attorney General's Office regarding Heckel's spam. Hill created a complaint matrix detailing 20 such complaints, and indicating that at least 16 involved messages received from Heckel after June 26.1 At least one of these complainants had previously registered here-mail address at the on-line registry above mentioned, before she received Heckel's spam.

To send his spam, Heckel used at least 12 different Internet addresses with the domain name "juno.com," which accounts were generally cancelled by Juno within two days of his bulk e-mail transmissions. When Juno would shutdown one of Heckel's accounts, Heckel would simply open a new one, and send out more batches of spam. Some recipients attempted to reply to Heckel's spam and failed -- in some cases because Juno had already terminated the account or accounts from which the spam had been sent.

Some recipients stated that the domain name Heckel used to send the spam was different from the domain identified in the message. In particular, 9 messages indicated that they originated from "13.com" but the "message-id"display demonstrated that they had actually been transmitted from a different domain. The owner of the inactive domain name of "13.com" since1995 submitted an unrebutted declaration stating that he had never authorized Heckel to use the domain nam

Heckel sold 17 copies of his booklet to Washington residents before the State filed its suit. In September 1998, Heckel cashed a check sent by a Washington resident in response to one of his spam messages.

In response to the State's motion for summary judgment, Heckel did not contest any of the facts above described. The

trial court granted the State's motion on September 13, 2002, and on October 18, 2002, granted injunctive relief, imposed a civil penalty of $2000, and ordered Heckel topay the State's attorney fees and costs of $96,197.74.

ANALYSIS

Viewing all facts in the light most favorable to the party challenging the summary dismissal, this court reviews a trial court's grant of summary judgment de novo. Heckle I, 143 Wn.2d 824, 831-32, 24 P.3d 404 (2001). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Kruse v.Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993); CR 56(c). A legislative act is presumed constitutional, "and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt." Heckel I, 143 Wn.2d at 832 (quoting State v. Brayman, 110 Wn.2d 183, 193, 751 P.2d294 (1988).

The Commercial Electronic Mail Act provides in pertinent part:

(1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that:

(a) Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

(b) Contains false or misleading information in the subject line.

(2) For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address. RCW 19.190.020 (emphasis ours).

Heckel does not deny that he violated RCW 19.190.020(1)(a) by using the domain name "13.com" without the permission of the name's owner, thereby misrepresenting or obscuring the point of origin or the transmission path of at least 9 of his spam messages sent to Washington residents. Instead, Heckel contends that the State failed to present evidence that he sent any e-mail "to an electronic mail address that {he knew}, or {had} reason to know, {was} held by a Washington resident."In support of this assertion, Heckel first argues that the only way the State could prove that he had a "reason to know" is by proving facts to satisfy RCW 19.190.020(2), that is, by presenting evidence to demonstrate that the information regarding Washington residency was available from the registrant of the Internet domain name of each particular e-mail address at issue.

Not only does Heckel fail to cite any authority for this position, but also we find his proposed reading of the statute absurd. RCW 19.190.020(2)states that a person knows -- in other words, actual knowledge is imputed -- if residency information is available from the domain name registrant. The statute does not state that proof that the residency information is available from the Internet domain name registrant is the exclusive means of proving knowledge under the statute. Moreover, this section says nothing about what evidence is sufficient to demonstrate that a sender had a "reason to know" that an e-mail address

was held by a Washington resident. Finally, there is nothing in the record to indicate that the State intended to rely on RCW 19.190.020(2) to show Heckel's knowledge here.

Relying on our Supreme Court's analysis in Heckel I of American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (1997), Heckel next contends that the Act and the Commerce Clause required the State to prove he had knowledge as to specific e-mail addresses. In American Libraries, the court held that aNew York statute that made it a felony to use a computer communication system to display or distribute sexually explicit content to minors violated the Commerce Clause. 969 F. Supp. at 169. The statute was overreaching in that applied to any type of Internet activity -- even web sites or chat rooms where individuals posting content that would be legitimate for adults have no control over future access by minors, in New York or anywhere else. As our Supreme Court observed in Heckel I, that case is distinguishable because here, the Act is limited to deceptive unsolicited commercial e-mail messages sent to a Washington resident -- in other words, the sender actually intends the recipient to access the content. Heckel I, 143 Wn.2d at 840.

Heckel argues that the Court's statement, "the Act reaches only those deceptive UCE messages directed to a Washington resident," Heckel I, 143Wn.2d at 840, indicates that to satisfy the Act and the Commerce Clause the State must prove that he knew that specific e-mail addresses were registered to Washington residents and that here, although he knew based on his conversation with Hill on June 25 that some of his e-mails had been received by unidentified Washington residents, the State failed to prove that he had specific knowledge that any

particular addresses belonged to Washington residents as required by the statute.

Again, if we were to interpret the Act the way Heckel suggests, no spammer sending deceptive e-mail could ever violate the Act as long as he were to use a bulk e-mail program to harvest large numbers of addresses without regard to residence of the owners, because he could always claim that he had no specific knowledge about particular recipients. But Heckel does not dispute that he actually intended to send his message to each person who received it. He also does not dispute that Hill advised him about the Act and that the Attorney General's Office had received complaints from Washington residents who had received his e-mail. He also does not dispute the State's evidence that more Washington residents actually received his e-mails after his conversation with Hill. Despite his knowledge that the bulk e-mail software he was using to send out his spam had gathered addresses and sent e-mail to Washington residents, Heckel failed to take any action whatsoever to determine whether any of his intended bulk e-mail recipients were Washington residents or to change his practices to comply with the Act, and in fact he continued to send the same e-mail messages to more Washington residents. The trial court properly found that these facts were sufficient to demonstrate Heckel's knowledge that he was in fact directing deceptive spam to Washington residents.

The State urges this court to adopt the reasoning of the trial court and at least two federal district courts and hold that a spammer sending millions of e-mails over the Internet has reason to know that he could be "ha{u}led into court in a distant jurisdiction to answer for the ramifications of that solicitation." Internet Doorway, Inc. v. Parks, 138 F. Supp. 2d

773,779-80 (S.D. Miss. 2001); Verizon Online Servs., Inc. v. Ralsky, 203 F.Supp. 2d 601, 618 (E.D. Va. 2002). Heckel urges a rejection of this "statistical argument," arguing that the Act requires a "particular" or "specific" e-mail address of a Washington resident and that reasonable minds could differ on whether sending any particular number of e-mail messages must statistically impose a conclusive presumption that some of those would be directed to the addresses of Washington residents. But Heckel does not dispute that he sent between 100,000 and 1,000,000 messages per week over a period of at least four months. Based on these numbers, we agree with the State and conclude that Heckel had reason to know that his spam would be directed to Washington residents.

The State also contends that Heckel had reason to know that his spam was reaching Washington residents because some of them were listed at the website of the Washington Association of Internet Service Providers (WAISP), where Washington residents who do not want to receive spam can register. See, Heckel I, 143 Wn.2d at 837 n.13. Heckel responds that evidence that recipients2 of his spam were registered with WAISP is insufficient to prove that he had reason to know they were Washington residents because there was no evidence in the record on how the registry works and reasonable minds could differ on whether accessing the registry is unduly burdensome or whether an advertiser ought to be required to check one or more registries before sending out e-mail.

Again, we agree with the State. As of June 25, Heckel knew that his spam was reaching Washington residents and that they were complaining to the Attorney General. He knew that the Act prohibited the kinds of e-mail he was sending. He also knew, based on his conversation with Hill, that the WAISP

registry listed Washington residents that did not want unsolicited commercial e-mail. Because Heckel fails to identify any material fact for trial regarding his knowledge as above described, and because reasonable minds could not find that he did not have reason to know that he was sending e-mail to Washington residents, summary judgment was proper.

Heckel acknowledges in his reply brief that our Supreme Court has held that the Act does not facially violate the Commerce Clause but argues that it failed to consider whether it violates the clause as applied in this case. Relying on Quill Corp. v. North Dakota, 504 U.S. 298, 112 S. Ct.1904, 119 L. Ed. 2d 91 (1992), Heckel contends that his lack of ties with the State of Washington -- no employees, representatives, or physical facilities -- indicates a lack of a sufficient nexus with the State, such that he cannot be subject to the Act. But as the State points out, in Quill, the question was whether North Dakota violated the Commerce Clause by imposing an excise tax on an out-of-state company operating a mail order business. Because the Act does not involve taxation and the burden it imposes is slight in comparison, Quill is inapposite.
Moreover, Heckel reads Heckel I too narrowly. In Heckel I, 143 Wn.2d at833, the court explained not only that the Act is not facially discriminatory but also that it applies evenhandedly to both instate and out-of-state spammers
Finally, Heckel makes no reasoned argument showing how an act that prohibits only deceptive spam and that does not thereby violate the Commerce Clause on its face could possibly violate the Commerce Clause as applied to Heckel's deceptive spam. We conclude that the Act, as applied to Heckel in this case, does not violate the Commerce Clause.

Heckel also contends that the Act violates the First Amendment because it is vague and overbroad. Heckel also attempts to create an issue of material fact for trial by asserting that the subject lines on his e-mails were not misleading, particularly when viewed with the body of the e-mail.

Commercial speech is entitled to First Amendment protection if it isnot misleading. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The Act prohibits unsolicited commercial e-mail with false or misleading information in the subject line. RCW 19.190.020(1)(b). The trial court concluded that reasonable minds could not differ with the conclusion that Heckel's two subject lines, "Did I get the right e-mail address?" and "For your review - HANDS OFF!", were deceptive and misleading when the body ofthe e-mail consisted of an unsolicited advertisement. We agree with the trial court.

Heckel does not claim that his spam was anything other than commercial speech. To demonstrate that the subject line is not misleading, Heckel urges this court to consider the first line of the body of the e-mail or the whole message of the e-mail rather than viewing the subject line alone,"artificially segregating the subject line from the rest of the communication and banning creative advertising to entice potential customers to read the rest of the commercial speech." Brief of Respondent at 35. But the Act does not regulate the body of the e-mail, only the subject line. Here, the subject line was clearly designed to entice the recipient to open the message, not with creative advertising as Heckel contends, but by enticing the recipient to believe that the message might be from a friend or acquaintance or business contact who is trying to "get the right e-mail address" or who is

sending something confidential, rather than a commercial advertisement. The trial court did not err.

Heckel's reliance on Reno v. Civil Liberties Union, 521 U.S. 844, 117S. Ct. 2329, 138 L. Ed. 2d 874 (1997), is equally unpersuasive. Reno does not involve commercial speech, but concerns sexually explicit communications on the Internet, and a federal statute that used terms such as "indecent" and "patently offensive."

Because the Act is narrowly tailored to regulate only deceptive commercial speech, which is not protected by the First Amendment, the Actis not overly broad. Neither is the Act unconstitutionally vague. Contrary to Heckel's argument, the Act's prohibition against "misleading"subject lines or transmission paths is not vague. Indeed, the United States Supreme Court used the word "misleading" in Central Hudson, 447 U.S. at 566 as part of the appropriate standard in determining when commercial speech is constitutionally protected: "For commercial speech to come within {the protection of the First Amendment} it at least must concern lawful activity and not be misleading." Id. See also, City of Yakima v. Irving, 70 Wn. App. 1, 851 P.2d 724 (1993) (holding that an ordinance that prohibited making "`misleading" police reports not unconstitutionally vague).

CONCLUSION

The trial court did not err in granting summary judgment to the State. Heckel's spam clearly fell within the hard core of the prohibitions contained in the Act: The spam was accompanied by misleading subject lines; was transmitted along misleading paths, and 9 of the spam messages used the domain name of a third party who had not given permission to Heckel to use that inactive domain name. Heckel received actual notice from the

Attorney General that his spam violated Washington's Act and that it was in fact being received by Washington residents. Mr. Hill explained to Heckel how he could go about learning the e-mail addresses of Washington residents who do not wish to receive spam at all -- let alone deceptive spam. Not only did Heckel fail to change his procedures for disseminated spam, but he also failed to change his misleading subject lines, a means by which he could have brought his advertisements within the parameters of the Act -- insofar as misleading subject lines are concerned, anyhow. The Act does not violate the Commerce Clause, either facially or as applied to Heckel. The Act does not violate the First Amendment, either facially or as applied. The Act is not unconstitutionally vague. We affirm the trial court's summary judgment ruling and the decree that was subsequently entered.

WE CONCUR:

1 Three entries on the matrix do not indicate the date of receipt andone was received on June 22, 1998.

2 One spam recipient's affidavit indicates that she was registered with WAISP and Hill's complaint matrix indicates that 11 other recipients were also registered with WAISP.

APPENDIX F

WASHINGTON SUPREME COURT ORDER DENYING REVIEW

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON	)	NO. 75827
	)	
Respondent	)	ORDER
	)	
v.	)	C/A NO. 51204-8-I
	)	
JASON HECKEL, doing	)	FILED
business as	)	SUPREME COURT
NATURAL INSTINCTS,	)	STATE OF WASHINGTON
	)	2005 MAR - 1 P 4:47
Petitioner.	)	BY C.J. MERRITT CLERK

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J. Johnson, considered this matter at its March 1, 2005 Motior Calendar, and unanimously agreed that the following order entered.

IT IS ORDERED:

That the Petition of Review is denied.

DATED at Olympia, Washington this 1st day of March, 2005.

For the Court

Gerry L. Alexander

_____

CHIEF JUSTICE